Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Director, Governmental Liaison & Disclosure
C:SBSE:CLD:GLD

from: Assistant Chief Counsel
(Disclosure & Privacy Law)

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subject: Request from Department of Veterans Affairs to waive the fee applicable to the disclosures of unearned income information pursuant to IRC § 6103(l)(7)(D)(viii).

ISSUE:

Whether, despite cost-shifting language in 38 USC § 5106, the IRS may charge the VA a fee for disclosure of return information to the VA, pursuant to IRC § 6103(p)(2), for use in determining veterans' eligibility for and amount of benefits under certain Federal benefits programs created under title 38 of the United States Code.

CONCLUSION:

The cost-shifting language of 38 USC § 5106 does not prohibit the IRS from charging the VA a reasonable fee (in accordance with IRC § 6103(p)(2)) for disclosure of return information pursuant to IRC § 6103(l)(7)(D)(viii).

Our opinion that the IRS is not required by 38 USC § 5106 to bear the costs of providing return information to the VA does not mean that the IRS is required to charge the VA for this information. Section 6103(p)(2) permits, but does not require, the IRS to charge a fee for furnishing return information. It is a policy decision whether to actually charge this discretionary fee.

FACTS:

The IRS is authorized by IRC § 6103(l)(7)(D)(viii) to disclose to the Department of Veterans Affairs (VA) certain unearned income information for use by the VA in determining eligibility for and amount of benefits under specified benefits programs created under title 38. The IRS is also authorized by IRC § 6103(p)(2) to charge a reasonable fee for the furnishing of return information under the provisions of title 26. The Office of General Counsel at the VA (OGC) has asserted that, pursuant to 38 USC § 5106 (section 5106), the IRS is required to

bear the costs of furnishing return information to the VA, and has requested that the IRS waive the fee that would otherwise be charged to the VA.

ANALYSIS:

Statutory Text:

The sentence in section 5106 on which the VA bases its opinion that the IRS is required to provide information at IRS expense states "The cost of providing information to the Secretary [of VA] under this section [5106] shall be borne by the department or agency providing the information." Pursuant to IRC § 6103(a), return information may only be disclosed as authorized by title 26. IRS disclosures of return information to the VA are made solely pursuant to IRC § 6103(l)(7)(D)(viii), and not pursuant to any provision of title 38. By its own terms, section 5106 applies only to costs of providing information under 38 USC § 5106. Thus, we conclude that section 5106 is inapposite because return information is disclosed to the VA solely pursuant to IRC § 6103(l)(7)(D)(viii).

The Supreme Court has held that where two statutes address the same issue, both statutes must be given effect if that is possible. "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (resolving an apparent conflict between the Sherman Anti-trust Act and the Agricultural Act regarding regulation of interstate commerce). More recently, the Court has stated: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. When there are two acts upon the same subject, the rule is to give effect to both if possible. ... The intention of the legislature to repeal must be clear and manifest." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (internal quotations deleted) (holding that the Equal Employment Opportunities Act of 1972 did not repeal the promotion and hiring preferences accorded to Indian employees at the Bureau of Indian Affairs). There is no suggestion, manifest or otherwise, in section 5106 that Congress intended this provision to repeal the effect of IRC § 6103(p)(2) with respect to return information disclosed by the IRS to the VA.

We are of the opinion that the applicability of these two statutory provisions is clear and not in conflict: Federal agencies that provide information to the VA under 38 USC § 5106 do so at their own expense; the IRS provides return information to the VA under IRC § 6103(l)(7)(D)(viii) and is authorized to charge the VA a reasonable fee under IRC § 6103(p)(2). Nevertheless, because the OGC perceives a conflict between these statutory provisions, we provide below our further analysis in support of our opinion that the IRS may charge the VA a fee for disclosure of return information for use by the VA in determining veterans'

eligibility for and amount of benefits under the benefits programs specified in IRC § 6103(l)(7)(D)(viii), notwithstanding 38 USC § 5106.

Statutory Construction:

The letter from the OGC explaining its reasoning for asserting that IRS must bear the cost of providing return information to the VA asserts that basic statutory construction[1] directs this result. The letter refers to two canons of statutory construction in its paragraph 8: that more recent legislation controls over older legislation and that specific legislation controls over general legislation. While we concur with the OGC's assertion that these two canons should be considered, we disagree with that office's analysis of their application to this situation.

The canon that more recent legislation controls over older legislation only applies where the newer legislation cannot be reconciled with the older legislation. As noted above, these two statutory provisions are easily reconciled, and, as explained more fully below in the discussion of legislative history, Congress did not intend the second sentence of 38 USC § 5106 to conflict with IRC § 6103. The phrasing of the sentence, limiting the assignment of costs only with respect to information provided to the VA pursuant to section 5106, makes this clear. Another canon of statutory construction, which OGC did not raise, is that repeal by implication is not favored. (Alternatively stated: a newer statute should not be interpreted to repeal an older statute (in whole or in part) unless Congressional intent to repeal is explicit or unavoidable. "The intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton* at 550, citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945). "The result of the authorities cited is that when an affirmative statute contains no expression of a purpose to repeal a prior law, it does not repeal it unless the two acts are in irreconcilable conflict, or unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislature to repeal must be clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 601 (1883). If Congress intended to change the fee provision applicable to disclosures of return information to the VA (in essence, repealing IRC § 6103(p)(2) with respect to the VA), Congress would have amended IRC § 6103, or otherwise explicitly stated this intent in the legislation.

[1] Canons of statutory construction are guidelines for interpretation and comparison of statutes used to resolve apparent conflicts between laws.

The OGC also raises the canon of statutory construction that more specific legislation controls over more generally applicable legislation. The OGC asserts that section 5106, by applying to information provided to the VA for purposes of its benefits programs, is more specific than IRC § 6103's application to the disclosure of return information. We are of the contrary opinion – section 6103 applies explicitly and exclusively to the confidentiality and disclosure of tax returns and return information. Prior to 1976, many Federal agencies had access to tax returns and return information based on various statutes and on regulations issued pursuant to executive order. In enacting IRC § 6103, Congress made clear that it intended to create an exclusive program of tax information usage. Arising out of the Watergate investigations, the amendments to IRC 6103 were designed to ensure the confidentiality of tax returns and return information by restricting the authority to disclose this material.

> The Congress reviewed each of the areas in which returns and return information were subject to disclosure. With respect to each of these areas, the Congress strove to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary assessment program. ... the Congress felt that returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103 where it was determined that disclosure was warranted. ... The Act provides that as the general rule returns and return information are to be confidential and not subject to disclosure except as specifically provided in section 6103 or other section of the [Internal Revenue] Code.

General Explanation of the Tax Reform Act of 1976, 94th Cong., p. 315 (December 29, 1976).

Section 6103 governs the disclosure of tax returns and return information, including explicit provision for disclosure to the VA of "unearned income information" for use in four specific benefits programs. In contrast, section 5106 addresses all Federal agencies providing unspecified information to the VA for its use in any benefits program the VA operates. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* at 550-551, citing *Bulova Watch Co. v. United States*, 365 U.S. 753 (1961) and *Rogers v. United States*, 185 U.S. 83, 87-89 (1902).

Legislative History:

In an effort to determine whether Congress intended section 5106 to override the already-existing authority of IRC § 6103(p)(2), we have researched the legislative

history of section 5106. We found no indication that Congress intended to override section 6103(p)(2). Indeed, it appears that Congress was concerned with, and intended only to prevent, Federal agencies from charging the individual veterans personally for the costs of providing information to the VA.

The first sentence of section 5106 was added to title 38 as part of Pub. Law 94-432, effective September 30, 1976. It reads "The head of any Federal department or agency shall provide such information to the Secretary [of the VA] as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto." The Veterans Claims Assistance Act of 2000 added the second sentence stating that agencies providing information to the VA under section 5106 shall bear the costs. The OGC has asserted that the more recent and more specific provision of section 5106 requiring Federal agencies to bear the costs of providing information to the VA should control over the older and more general provision in IRC § 6103(p)(2) authorizing the IRS to charge fees for furnishing return information. This argument ignores the fact that IRC § 6103(a) is more specific in its application to returns and return information than is section 5106 in its application to any information provided by any Federal agency. The specific prohibition in section 6103(a) against disclosing return information except as authorized in title 26 means that the IRS cannot disclose return information to the VA under title 38, and therefore the cost shifting provisions of section 5106 do not apply to disclosures of return information.

Section 6103 was enacted in its present form by the Tax Reform Act of 1976, effective January 1, 1977. The original enactment included section 6103(p)(2), and this provision has not been amended since that time. Section 6103(l)(7)(D)(viii) was added by OBRA 1990, and made effective November 5, 1990. Also as part of OBRA 1990, Congress enacted 38 USC 5317 (formerly 5117) which describes how the VA is to use income information obtained from the IRS and the SSA pursuant to IRC § 6103(l)(7)(D)(viii). Section 5317(f) provides that "The Secretary [of the VA] shall pay the expenses of carrying out this section from amounts available to the Department for the payment of compensation and pension." Further, section 5317(g) provides that "the authority of the Secretary [of the VA] to obtain information from the Secretary of the Treasury and the Commissioner of Social Security under section 6103(l)(7)(D)(viii) expires on September 30, 2008."[2] The OGC has already stated that it interprets this provision to direct the expenditure of the identified funds for purposes of notifying veterans that their information will be compared with information obtained from the IRS and the SSA, but that it does not authorize spending those funds to pay fees to the IRS or the SSA to obtain the match information. Ordinarily, we defer to another agency with respect to the interpretation of that agency's statutory provisions. Here, the OGC's

[2] The provision originally stated that information now provided to VA by SSA was provided by the Secretary of Health and Human Services. Also, the original expiration date was September 30, 1992; Congress has extended the expiration date several times.

interpretation of 38 USC 5317, limiting the use of the identified funds, is not the only interpretation of section 5317. Indeed, based on the legislative history of this provision, it seems to us that a better reading is that Congress intended the VA to cover the costs of obtaining information. Senate bill 2611, which proposed the addition of IRC § 6103(l)(7)(D)(viii) and 38 USC 3117 (now 5317), provided:

> The costs incurred by the Administrator [of VA] in obtaining, verifying, and using information disclosed pursuant to the amendments made by section 1 shall be paid for out of the Veterans' Administration's compensation and pension account, and amounts collected as a result of such actions shall be paid into such account.

S. Rep. 100-412, 100th Cong, 2d Sess. (July 6, 1988) at 3, citing proposed section 4 of the bill.

The Report of the Committee on Veterans Affairs pertaining to Income Verification for Certain VA Needs-based Programs, in describing the proposed additions, states that the bill would:

> Provide that the VA's costs of establishing and operating the program under which the return information would be obtained, used, and verified would be paid for out of the VA's compensation and pension account, and that amounts collected as a result of the program would be paid into that account.

S. Rep. 100-412 at 4.

The Report, at page 7, explains the rationale for this approach to covering the costs of the income verification program:

> The Committee is greatly concerned that the costs of administering this cost-saving program not be taken from the VA's already-overburdened VA general operating expenses account, which provides funding primarily for the Department of Veterans' Benefits' operational expenses. Accordingly, the Committee bill would generally provide in new section 3117 that the VA's costs of establishing and operating the program under which the return information would be obtained, used, and verified, would be paid for out of the VA's compensation and pension account, and that all the savings under such program would accrue into such account. By providing that collections achieved as a result of the matching of data would be credited to the compensation and pension account, an on-going augmentation of the account from which the administrative expenses could be drawn would be provided.

Furthermore, the Conference Report for the Omnibus Reconciliation Act of 1990 (which enacted IRC § 6103(l)(7)(D)(viii) and 38 USC § 5317) states:

> *House bill*:
>
> To the extent that VA's general operating expenses (GOE) account appropriations are insufficient to fund administrative costs to implement the program, the Secretary would be required to pay the expenses from amounts available to the Department for the payment of compensation and pension.
>
> *Senate amendment*:
>
> Section 11051 is substantively identical to the House bill except that (a) the requirement to pay implementation expense from amounts available for the payment of VA compensation and pensions would not be contingent on the insufficiency of GOE funds.
>
> *Conference agreement*:
>
> Section 8051 follows the Senate amendment with respect to implementation costs.

Conf. Rep. 101-964, 101st Cong., 2d Sess, (Oct. 27, 1990) at 996.

Thus, it is apparent that Congress intended the VA to cover the costs of obtaining return information pursuant to IRC § 6103(l)(7)(D)(viii). The later enactment of the second sentence of section 5106, applying generally to obtaining information from Federal agencies, does not alter the intent or the applicability of section 5317(f) which specifically applies to the costs of obtaining return information under the authority of IRC § 6103(l)(7)(D)(viii).

The OGC has also said that they interpret 38 USC § 5106 to prohibit the VA from paying the costs of obtaining information from any Federal agency for the purpose of determining eligibility for or amount of benefits. However, the legislative history supports our view that Congress' concern in enacting section 5106 was to prevent Federal agencies from charging the individual veterans personally for the costs of providing information to the VA for purposes of determining benefits. The Report from the Committee on Veterans' Affairs with respect to the Veterans' Claims Assistance Act of 2000 (H.R. 4864) states at page 4 that the reported bill would "Require other Federal agencies to furnish

relevant records to the Department at no cost to the claimant." [3] H. Rep. 106-781, 106th Cong., 2d Sess, (July 24, 2000) (emphasis added). Furthermore, in floor debate in the House, Rep. Smith of New Jersey noted that the "Veterans Claims Assistance Act of 2000 would also require other Federal agencies to furnish service records to the VA at no cost to the claimant." Cong. Rec., H6789, July 25, 2000 (emphasis added).

Later material does not reflect this concern about costs to claimants, but we also found nothing to indicate that Congress intended the change in phrasing to prohibit the VA from bearing the costs of obtaining information. The Congressional Record reflects[4] that the House bill provides that "Federal departments or agencies shall furnish the Department of Veterans Affairs with records pertaining to a benefits application without charge." The Senate bill provides that "the costs of providing VA with information are to be borne by the department or agency supplying the information." The Compromise Agreement follows the Senate language. Cong. Rec., H9916, October 17, 2000. We found nothing explaining the decision to follow the Senate language instead of the House language. It may be worth noting that the Veterans' Claims Assistance Act (VCCA) was enacted in response to concerns that the VA denied benefits claims when the veteran failed to provide substantiating records and the VA refused to assist veterans to obtain records for use in determining benefits even when the VA itself knew where the records were stored or could likely obtain the records more easily than the veteran could. The overall intent of the VCCA was to reduce the burden on veterans applying for benefits and to require the VA to assist such veterans more than the VA had historically done.

POLICY CONSIDERATIONS:

[redacted]

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[3] The report also states at page 11 that "Section 5 would add a new sentence to section 5106 of title 38, United States Code, to provide that Federal departments or agencies shall furnish the Department of Veterans Affairs with records pertinent to a benefits application without charge." We do not perceive that this sentence is inconsistent with the sentence on page 4. Rather, page 11 states the proposed legislative text, while page 4 indicates the reason for such proposal.

[4] Both the House and Senate proposals amended 38 USC § 5106 by adding a new last sentence. H.R. 4864 proposed: "No charge may be imposed by the heads of any such department or agency for providing such information." S. 1810 proposed: "The cost of providing such information shall be borne by the department or agency providing such information."

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